Filed 12/11/03

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SEBASTIAN WOLFE, Defendant and Appellant.	E032675 (Super.Ct.No. INF037913) **OPINION**

APPEAL from the Superior Court of Riverside County. Robert Wallerstein, Judge. (Retired Judge of the Mun. Ct. for the L.A. Jud. Dist. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Wilson Adam Schooley, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia,

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II, III, and IV and footnote 1.

Supervising Deputy Attorney General, and Janelle Boustany, Senior Deputy Attorney General, for Plaintiff and Respondent.

Defendant Sebastian Wolfe lived with his mother in a trailer park. On May 9, 2001, a police officer saw several firearms in their trailer. On May 11, 2001, having learned that defendant had a misdemeanor conviction that made it illegal for him to possess a firearm, police officers searched the trailer. Defendant told them, "[M]y guns are in the light fixture[] above the kitchen . . . ." In that light fixture, as well as elsewhere in the trailer, the police found sundry firearms.

A jury found defendant guilty on one count of possession of a firearm with a qualifying misdemeanor. (Pen. Code, § 12021, subd. (c)(1).) He was sentenced to three years' probation, on terms including participation in the Mental Health Treatment Program.

In the published portion of this opinion, we hold that the trial court erred by failing to give a unanimity instruction. There is a split of opinion regarding the harmless error standard applicable to this error; we hold that the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) applies. Finally, however, we hold that, even under this standard, the error was harmless.

In the unpublished portion of this opinion, we find no other error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *The Prosecution Evidence*.

Defendant lived with his mother, Charlotte Sharp, in a trailer park in Palm Desert. His mother owned the trailer and rented the space.

On May 9, 2001, around 2:30 or 3:00 p.m., Sheriff's Deputy Bill Conoway went to the trailer to talk to defendant about a report of a stolen vehicle. Defendant's mother let Deputy Conoway into the trailer to look for defendant. Deputy Conoway saw two handguns on the living room floor. He also saw three soft rifle cases leaning against the living room wall; when he touched them, they felt as if they contained rifles. Defendant, however, was not in the trailer. About five minutes later, Deputy Conoway found defendant by the pool and spoke to him.

Later on May 9, about 6:00 p.m., Deputy Conoway returned to the trailer in response to a report of a disturbance. He found defendant in the trailer. With defendant's consent, he walked through the whole trailer. He did not see any firearms.

On May 11, Deputy Conoway and other officers arrived at the trailer to execute a search warrant for the guns. Defendant was detained and placed in Deputy Conoway's patrol car. After about 15 minutes, Deputy Conoway got into the patrol car with him. Defendant said, "Those motherfuckers will never find the guns. Since you are my baby Jesus and I want you to be the hero, I'll tell you where the guns are at." Deputy Conoway replied, "[W]here are the guns[?]" Defendant answered, "[M]y guns are in the

light fixtures above the kitchen and the ammunition is in [a] cupboard next to the refrigerator."

Inside the trailer, the police found the following firearms:

1. A Remington .30-06 rifle. It was not loaded. However, .30-06 ammunition was found in a kitchen cupboard.

2. A 6.35-millimeter (equivalent to .25-caliber) semiautomatic handgun.

3. A Colt .38-caliber revolver.

4. A Winchester 16-gauge shotgun. It appeared to be an antique.

5. A bolt-action Sharps shotgun. It, too, appeared to be an antique.

6. A Colt .45-caliber semiautomatic handgun.

The .30-06 rifle was found in the shower. Otherwise, the appellate record is somewhat confusing as to which firearms were found where. Three guns were found in a "cutout" portion of a fluorescent light fixture in the kitchen ceiling, over a china cabinet or cupboard. As best we can tell, these were the 6.35-millimeter pistol, the Colt .38, and the 16-gauge shotgun. The Colt .45 seems to have been found in another cupboard over the refrigerator. Finally, the Sharps shotgun seems to have been found in a "study area" off the kitchen.

The police found .22 and .38 caliber ammunition in a kitchen cupboard. The guns Deputy Conoway had seen on May 9 were not found. Likewise, the rifle cases he had seen were not found. His report of his investigation on May 9, 2001, did not mention any

firearms. None of the guns were fingerprinted. The Department of Justice kept the 16-gauge shotgun and the Sharps shotgun for its historical gun collection.

It was stipulated that defendant had been convicted of a misdemeanor in 1996 and that, as a result, he was prohibited from owning or possessing a firearm.

B. *The Defense Evidence*.

Defendant's mother testified that all of the firearms in the trailer belonged to her. She knew that defendant could not own or possess firearms, but she thought she could have guns in her own home. Defendant knew where the guns were, but he had no control over them. He could not touch them or move them around, and he did not.

The .30-06 shotgun had belonged to her deceased first husband. It was operable, but unsafe because it misfired occasionally. It was in the shower because she was going to take it to be repaired.

She had inherited most of the other guns from her father. For example, the 6.35-millimeter was "a little purse gun that [her] father bought for [her] mother . . . , probably during World War II." She had no ammunition for it.

The Colt .38 had also been passed down through her father's family. She did not know if it was operable.

The Winchester 16-gauge shotgun had belonged to her father. He had gotten it when she was a child, for hunting. She did have ammunition for it.

The Sharps shotgun was a Civil War weapon. It had belonged to her grandfather. It had no firing pin. She had no ammunition for it -- indeed, ammunition for it was no longer manufactured.

The Colt .45 had belonged to her father. She testified that it was inoperable. However, she admitted having .45 ammunition.

Defendant's mother testified that she also owned the two handguns Deputy Conoway had seen on the floor on May 9. She was not the person who had put them on the floor; she had been surprised to see them there. One was a .357 magnum that had belonged to her first husband. The other was a .22 Ruger handgun. She denied that, on May 9, there were any rifles or rifle cases to be seen.

On May 11, she testified, the police did not find these two guns because they were in the dishwasher. She was not the person who had put them in the dishwasher. Afterwards, her son-in-law told her they had been there. Her son-in-law later sold them without her permission.

She kept the guns in the light fixture and in the cupboard over the refrigerator to hide them from burglars. There had been some burglaries in the trailer park. A friend of hers had cut the holes in the ceiling and had put in clear plastic so she would have more light for the dishes in the china cabinet. He had never finished the job.

On May 9, 2001, she was very angry with defendant. As a result, she told Deputy Conoway that he was a gun collector. This was not true.

In 1996, as a result of defendant's misdemeanor conviction, the Sheriff's Department had taken all the firearms. In a civil action, a trial court determined that they belonged to her and ordered them returned to her. Because defendant was living with her, and because he was not allowed to possess firearms, she had an acquaintance keep them at his house. In 2000, she became concerned because the acquaintance often was away from home and had housesitters. She had him return the firearms to her.

II

THE ADMISSIBILITY OF DEFENDANT'S STATEMENTS UNDER MIRANDA

Defendant contends the admission of his statements to Deputy Conoway violated his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

A. *Additional Factual and Procedural Background*.

Before trial, defense counsel objected to admission of the statements defendant made to Deputy Conoway in the patrol car, as "the fruit of the custodial interrogation . . . ." At defense counsel's request, the trial court held an evidentiary hearing, at which Deputy Conoway testified as follows.

Deputy Conoway and defendant were together in a police car. Neither of them had said anything until defendant said, "Those stupid fuckers will not be able to find my guns. . . . [S]ince you are my baby Jesus and I want to make you the hero, . . . I'll tell you where they are." Deputy Conoway immediately asked defendant where the guns were. Defendant then told him where the guns were. It was stipulated that defendant was in custody at the time.

The trial court overruled the objection. It explained: "[T]he defendant was in custody. However, it was not a custodial interrogation. The defendant made those statements spontaneously, and it was conversation rather than interrogation. The response by the officer was conversation."

B. *Analysis*.

Under *Miranda*, "[b]efore being subjected to 'custodial interrogation,' a suspect 'must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney . . . .' [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 732, quoting *Miranda v. Arizona*, *supra*, 384 U.S. at p. 444.) "Statements obtained by the police in violation of *Miranda* are inadmissible to establish guilt. [Citation.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1310.)

"[I]nterrogation . . . encompasses both express questioning and its 'functional equivalent.' [Citation.] 'That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . .' [Citation.]" (*People v. Sims* (1993) 5 Cal.4th 405, 440, quoting *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 [100 S.Ct. 1682, 64 L.Ed.2d 297].) However, it is "the settled rule that volunteered statements not the product of interrogation are admissible." (*People v. Edwards* (1991) 54 Cal.3d 787, 815.)

Ordinarily, "'[w]e review the trial court's finding regarding whether interrogation occurred for substantial evidence or clear error.' [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1034, quoting *People v. Clark* (1993) 5 Cal.4th 950, 985.) When, however, as here, the relevant facts are undisputed, we apply an independent judgment standard of review. (*People v. Farnam* (2002) 28 Cal.4th 107, 178.)

Defendant's initial, "baby Jesus" remark plainly was not the product of interrogation. It is undisputed that, when he made this statement, Deputy Conoway had not questioned him; in fact, neither of them had said anything. Simply getting into the patrol car with defendant was not reasonably likely to elicit an incriminating statement.

Defendant therefore necessarily relies on the fact that, next, Deputy Conoway asked him where the guns were, and he told Deputy Conoway where the guns were in response to this question. But "[j]ust as custodial interrogation can occur in the absence of express questioning [citation], not all questioning of a person in custody constitutes interrogation under *Miranda*. [Citations.]" (*People v. Ray* (1996) 13 Cal.4th 313, 338.)

Ray is controlling here. There, the defendant, who was in prison for an unrelated crime (*People v. Ray, supra,* 13 Cal.4th at p. 333), told a prison investigator that he wanted to "clear up matters that were bothering him." (*Id*. at p. 334.) He then confessed to a number of crimes, including those currently charged. (*Ibid*.) From time to time, the investigator asked questions about such matters as dates, locations and what had happened to the victims. (*Id*. at p. 334 and 334, fn. 9.)

Our Supreme Court held that these "incriminatory statements were not elicited as the result of interrogation." (*People v. Ray*, *supra*, 13 Cal.4th at p. 337.) It rejected the defendant's reliance on the fact that the investigator had asked questions: "[The investigator] did not influence the manner in which defendant reported the crimes. The entire confession was given in narrative, almost rambling form. To the extent [the investigator] interrupted and asked questions, they were merely 'neutral inquir[ies]' made for 'the purpose of clarifying [statements] or points that [he] did not understand.' [Citation.] Nothing in the substance or tone of such inquiries was reasonably likely to elicit information that defendant did not otherwise intend to freely provide." (*Id*. at p. 338, quoting *People v. Claxton* (1982) 129 Cal.App.3d 638, 647, 653.)

Here, almost identically, defendant had already decided to tell Deputy Conoway where the guns were. Deputy Conoway's single question was a "neutral inquiry." It was not reasonably likely to elicit any information that defendant had not already decided to provide. Indeed, it was not so much a question as a polite acknowledgement of defendant's offer. Thus, none of defendant's statements were the product of custodial interrogation.

Defendant relies on a long list of factors, including whether the police initiated the contact, where the contact took place, whether defendant was a suspect, whether his freedom of movement was restricted, whether the police told him he was being detained or arrested, and how many officers participated. He points out that perhaps as many as 11 police officers arrived at his home, banged on his door, then detained him and placed

him in the back of a patrol car. All of these factors, however, go to whether he was in custody, not whether he was interrogated. (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.)

Defendant also argues that he was mentally ill. The probation report indicates that he suffers from bipolar disorder. This fact, however, was not before the trial court when it ruled on defendant's objection. Accordingly, it can hardly be said to have erred by failing to consider it.

In any event, defendant's mental health has no bearing on whether he was interrogated. If he were to claim that his statements were *actually* involuntary, rather than just *deemed* involuntary for lack of *Miranda* warnings, it would become a factor to consider. (See *Withrow v. Williams* (1993) 507 U.S. 680, 693-694 [113 S.Ct. 1745, 123 L.Ed.2d 407].) Defendant, however, has made no such claim, below or on appeal.

We conclude that defendant's statements were properly admitted.

III

THE SUFFICIENCY OF THE EVIDENCE OF POSSESSION

Defendant contends there was insufficient evidence that he was in possession of any of the firearms.

"A defendant possesses a weapon when it is under his dominion and control. [Citation.] A defendant has actual possession when the weapon is in his immediate possession or control. He has constructive possession when the weapon, while not in his

actual possession, is nonetheless under his dominion and control, either directly or through others. [Citations.]" (*People v. Peña* (1999) 74 Cal.App.4th 1078, 1083-1084.)

"[P]ossession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another. [Citation.]" (*People v. Williams* (1971) 5 Cal.3d 211, 215.) "Exclusive possession is not necessary. A defendant does not avoid conviction if his right to exercise dominion and control over the place where the contraband was located is shared with others. [Citations.]" (*People v. Rushing* (1989) 209 Cal.App.3d 618, 622.)

"Proof of access to the place where the [contraband is] found, without more, is not sufficient to support a finding of unlawful possession. [Citations.]" (*People v. Hunt* (1971) 4 Cal.3d 231, 236 [drugs].) Similarly, "more than mere presence must be shown in order to prove constructive possession: the People must also show that defendant had dominion and control over the contraband. [Citations.] [¶] The inference of dominion and control is easily made when the contraband is discovered in a place over which the defendant has general dominion and control: his residence [citation], his automobile [citation], or his personal effects [citation]. However, when the contraband is located at premises other than those of the defendant, dominion and control may not be inferred solely from the fact of defendant's presence, even where the evidence shows knowledge of the presence of the drug and of its narcotic character." (*People v. Jenkins* (1979) 91 Cal.App.3d 579, 584.)

In *People v. Magana* (1979) 95 Cal.App.3d 453, the police found heroin, a cutting agent, and $2,000 in cash concealed in a light fixture in a bedroom the defendant shared with his wife. (*Id*. at p. 458.) The defendant argued "that a nonexclusive possession of narcotics precludes a finding of possession on his part . . . ." (*Id*. at p. 464.) The appellate court disagreed: "Here the narcotic, cocaine, was found concealed in a light fixture of the master bedroom of the premises of defendant and his wife . . . . The cocaine, the cutting substance and a substantial sum of money -- all located in one hidden place in [defendant's] master bedroom -- constitute circumstantial evidence sufficient to support the trial judge's finding that defendant . . . was a joint possessor of these items along with his wife . . . . [¶] The fact that [his] wife was not charged as a possessor of the contraband provides defendant . . . with no defense." (*Ibid*.)

Magana is virtually on all fours with this case (right down to concealment in a light fixture). Here, the firearms were found in the kitchen, study, and bathroom of the home defendant shared with his mother. His mother testified that he knew they were there. This alone was sufficient evidence that he was in constructive possession of them. The fact that his mother had dominion and control over the firearms did not preclude a finding that defendant had dominion and control over them as well.

Furthermore, defendant's mother admitted telling Deputy Conoway that defendant was a gun collector. She claimed that this was a lie, which she told only because she was very angry with defendant at the time. The jury, however, could believe her original statement and disbelieve her exculpatory explanation.

Almost all of defendant's mother's testimony went to show that she owned the guns. Legal title, however, although relevant, is not controlling on the issue of possession. The sole exception was her testimony that defendant did not have control of the firearms and did not touch or move them. Once again, however, the jury did not have to believe her. Moreover, there was some contrary evidence. She admitted that on May 9, when Deputy Conoway saw two handguns on the floor, she was not the person who had put them there, and she was surprised to see them there. Similarly, on May 11, during the search, the same two handguns were in the dishwasher, but she was not the person who had put them there. It was fairly inferable that defendant was moving them around, with or without her permission.

Finally, defendant's mother admitted that in 1996, following defendant's misdemeanor conviction, because she knew he was not allowed to possess firearms, she gave her guns to an acquaintance to store. It was fairly inferable that, at least in 1996, if she had kept the guns in her home, defendant would have had dominion and control over them. In 2000, she retrieved the guns from the acquaintance -- not because defendant's dominion and control had been reduced in any way, but only because she no longer felt they were safe there. The jury could reasonably conclude that this put them back in defendant's possession.

As we held in part II, *ante*, the trial court properly admitted defendant's statement, "[M]y guns are in the light fixtures above the kitchen and the ammunition is in [a] cupboard next to the refrigerator." Although there was sufficient evidence even without

this admission, it certainly confirmed that defendant knew the firearms were there, considered them his, and therefore had at least joint possession of them.

IV

INSTRUCTIONS DEFINING POSSESSION

Defendant contends the trial court erred by failing to instruct that mere proximity does not constitute constructive possession. Alternatively, he contends his trial counsel rendered constitutionally ineffective assistance by failing to request such an instruction. Finally, he contends his trial counsel rendered constitutionally ineffective assistance by failing to request an instruction that "unintentional temporary possession" of a firearm does not violate Penal Code section 12021.

A. *"Mere Presence" Instruction*.

As we discussed in part III, *ante*, a defendant's mere proximity to contraband -- or, as it is usually put, his or her "mere presence" -- is insufficient, standing alone, to prove possession. (See also *People v. Land* (1994) 30 Cal.App.4th 220, 224 [stolen property]; *People v. Johnson* (1984) 158 Cal.App.3d 850, 854 [drugs].) However, as we also discussed, this principle comes into play only when "the contraband is located at premises other than those of the defendant . . . ." (*People v. Jenkins*, *supra*, 91 Cal.App.3d at p. 584.) The fact that the contraband is located in a place within the defendant's dominion and control -- such as his or her home -- *is* sufficient. (*Ibid*.)

"A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. [Citations.]" (*People v. Ervin* (2000)

22 Cal.4th 48, 90.) Here, because the firearms were found in defendant's home, the "mere presence" rule was virtually irrelevant. Certainly it was not closely and openly connected to the facts. Accordingly, the trial court did not err by failing to instruct on it. Indeed, because the evidence proved that defendant lived in the trailer, and there was no evidence that he was "merely present" there, even if defendant had requested such an instruction, the trial court could properly have refused it.

For the same reasons, we conclude that trial counsel did not render ineffective assistance by failing to request a "mere presence" instruction.

B. *"Unintentional Temporary Possession" Instruction*.

"[Penal Code s]ection 12021 does not require any specific criminal intent; general intent to commit the proscribed act is sufficient. [Citation.]" (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 130 [Fourth Dist., Div. Two].) The key part of the proscribed act is possession. Accordingly, the possession must be intentional. (*Ibid*.)

Defendant relies on *People v. Jeffers* (1996) 41 Cal.App.4th 917. In *Jeffers*, there was evidence that a friend asked the defendant to drop off a package at a gun shop. The package consisted of a box inside a paper bag. When the defendant duly delivered the package, personnel of the gun shop opened it, in his presence, revealing a handgun inside. (*Id*. at pp. 919-922.)

On appeal, the defendant argued that the trial court had erred in two respects: (1) it had failed to give an instruction on the union of act and general criminal intent (CALJIC No. 3.30), and (2) it had refused the defendant's request for the following

instruction: " . . . 'When an ex-felon comes into possession of a firearm, without knowing that he has a firearm, and he later learns that he has a firearm, he does not automatically violate Penal Code section 12021(a) upon acquiring knowledge. [¶] The ex-felon violates the law only if he continues to possess the firearm for an unreasonable time, without taking steps to rid himself of the firearm.'" (*People v. Jeffers*, *supra*, 41 Cal.App.4th at pp. 920-921.)

The appellate court agreed that the trial court had erred by failing to give CALJIC No. 3.30. (*People v. Jeffers*, *supra*, 41 Cal.App.4th at pp. 922-923.) It noted: "A person who commits a prohibited act 'through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence' has not committed a crime. [Citation.] Thus, a felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922, quoting Pen. Code, § 26.) It added: "[K]nowledge plus physical possession may ordinarily demonstrate an intent to exercise dominion and control, but knowledge does not conclusively demonstrate such intent as a matter of law. Otherwise, a felon would be strictly liable for the crime immediately upon finding a firearm, even if found under innocent circumstances." (*Jeffers* at p. 922.)

The appellate court also agreed that the trial court had erred by refusing the defendant's requested instruction (*People v. Jeffers*, *supra*, 41 Cal.App.4th at pp. 924-925): "Although the instruction may be flawed in some respects, it was a reasonable

attempt to articulate a valid legal principle supported by the evidence." (*Id*. at p. 925.) The court, however, went on to add that: "Had the jury been instructed properly regarding general intent, we would have confidence this legal principle was considered by the jury in reaching its verdict. However, the failure to so instruct compels reversal." (*Ibid*.)

Here, unlike in *Jeffers*, the trial court did give CALJIC No. 3.30. It advised the jury that: "In the crime[] [of] possession . . . charged in Count[] 1, . . . there must exist a union or joint operation of act or conduct and general criminal intent. General intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, [he] is acting with general criminal intent, even though [he] may not know that [his] act or conduct is unlawful." It also instructed that: "'Constructive possession' does not require actual possession, but does require that a person knowingly exercise control over or the right to control a thing either directly or through another person or persons." Under *Jeffers* itself, these instructions were sufficient. (Accord, *People v. Padilla* (2002) 98 Cal.App.4th 127, 135-136.)

Nevertheless, defendant faults his trial counsel for failing to request a "pinpoint" instruction like the one in *Jeffers*. That particular instruction, however, clearly does not apply here. Defendant did not come into possession of a firearm without knowing he had a firearm, then later learn that he did have a firearm. He knew all along that the firearms were in the trailer. Thus, this case falls squarely under the general rule that, as *Jeffers*

recognized, once physical possession is proven, ordinarily knowledge is sufficient to prove the requisite intent.

Defendant therefore argues (or seems to -- his brief is not entirely clear) that the knowledge requirement itself is actually threefold: it requires not only knowledge of the presence and nature of the contraband, but also knowledge of the *possession*. Thus, even if he knew the firearms were there, he knew they were firearms, and he was in possession of them, unless he also *knew* he was in possession of them, he is not guilty. He characterizes this as "a mistake of fact disproving criminal intent."

The trial court, however, did instruct the jury, as part of its definition of "constructive possession," that defendant had to "*knowingly* exercise control over or the right to control" the firearms. (Italics added.) This was adequate to express the principle defendant is asserting. Accordingly, even if defendant had requested such an instruction, the trial court could properly have refused it. It follows that defense counsel did not render ineffective assistance by failing to make such a request.

V

FAILURE TO GIVE A UNANIMITY INSTRUCTION

Defendant contends the trial court erred by failing to give a unanimity instruction. (E.g., CALJIC No. 17.01.)

A. *The Need for a Unanimity Instruction*.

"In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime.

[Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.]" (*Ibid*.)

Defendant understandably relies on this court's opinion in *People v. Crawford* (1982) 131 Cal.App.3d 591. There, officers found the defendant and his girlfriend in his bedroom. They also found a .357 magnum in a holster at the foot of the bed and a .22 Luger in the bedroom closet. Both the defendant and his girlfriend denied ever seeing the gun in the holster. The girlfriend testified that the gun in the closet belonged to her. On rebuttal, the prosecution introduced evidence that two more firearms, a .38 derringer and another .357 magnum, had been found in an upstairs bedroom in which a third person was sleeping. (*Id*. at pp. 594-595.) The defendant was convicted of possession of a firearm following a felony conviction. (*Id*. at p. 593.)

We held that the trial court erred by failing to give a unanimity instruction sua sponte: "[C]ertain jurors might have been convinced defendant possessed one weapon, while others were convinced he possessed another weapon without all jurors at a minimum believing he possessed any one weapon. It is this unacceptable possibility

which taints the verdict in this case." (*People v. Crawford*, *supra*, 131 Cal.App.3d at p. 596.)

We acknowledged that a unanimity instruction is not required "where the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place . . . ." (*People v. Crawford*, *supra*, 131 Cal.App.3d at p. 599.) We concluded, however that this exception did not apply: "The acts of constructive possession involving the four guns are different. While possession of all guns was not fragmented as to time, the possession was fragmented as to space. Guns were in different parts of the house; the evidence showed unique facts surrounding the possessory aspect of each weapon." (*Ibid*.) "Certain jurors might quite easily have been persuaded beyond a reasonable doubt that appellant possessed one gun, but not another." (*Id*. at p. 598; see also *People v. Wesley* (1986) 177 Cal.App.3d 397, 400-401 [unanimity instruction was required where police found cocaine on table and heroin in defendant's waistband].)

We also held that a unanimity instruction was required even though the defendant's simultaneous possession of multiple firearms constituted only a single crime. (*People v. Crawford*, *supra*, 131 Cal.App.3d at p. 596.) This view has since been called into question. More recent cases indicate that a unanimity instruction is not required if the evidence shows only a single crime, albeit committed in several possible ways. (E.g., *People v. Hernandez* (1995) 34 Cal.App.4th 73, 77-80; *People v. Perez* (1993) 21

Cal.App.4th 214, 217-223; *People v. Davis* (1992) 8 Cal.App.4th 28, 41; see also *People v. Russo*, *supra*, 25 Cal.4th at pp. 1134-1135.)

We need not decide, however, whether *Crawford* is still good law on this point. After *Crawford* was decided, the Legislature changed the definition of the possession of a firearm with a felony or qualifying misdemeanor conviction. Now, the possession of multiple firearms -- even simultaneously -- constitutes multiple offenses. (Pen. Code, § 12001, subd. (k).) Here, the information charged only one count of unlawful possession; it alleged that "on or about May 11, 2001, . . . [defendant] did willfully and unlawfully own or have in his possession or under his custody or control, a firearm . . ." There was evidence, however, from which the jury could have found that defendant was in possession of up to eight separate firearms. Thus, there was evidence that he committed up to eight separately chargeable crimes. Accordingly, a unanimity instruction would be required under either line of cases.

We believe the trial court here erred by failing to give a unanimity instruction. As in *Crawford*, defendant's possession of the various firearms was "fragmented as to space." Here, moreover, it was fragmented as to time. And, again as in *Crawford*, the circumstances surrounding the possession of the different firearms were significantly different. For example, there was evidence that defendant actually touched and moved the guns Deputy Conoway saw on May 9. Defendant's mother testified that she did not put them on the floor or, thereafter, in the dishwasher; inferably, defendant did. She also testified that they were in the dishwasher on May 11. Thus, some jurors may have found

defendant guilty based on these guns. Other jurors may have been reluctant to convict defendant based on those guns, reasoning that defendant's brother-in-law inferably had access to the trailer and may have been the person who moved them, the police did not find them on May 11, and defendant never referred to them as "my guns." Such jurors would instead have found that defendant possessed the guns found on May 11.

We therefore turn to whether the error was prejudicial.

B. *The Applicable Harmless Error Standard*.

On the applicable standard of harmless error, there is a split of opinion. In *People v. Vargas* (2001) 91 Cal.App.4th 506 [Sixth Dist.], the court held that the state law standard of *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) applied. It reasoned that there is no federal constitutional right to a unanimous jury verdict; the right to a unanimous jury verdict, and hence the right to a unanimity instruction, derives from our state Constitution. (*Vargas*, at p. 562; see Cal. Const., art. I, § 16.) Other cases applying the *Watson* standard include *People v. Turner* (1983) 145 Cal.App.3d 658, 681-682 [Fourth Dist., Div. One], disapproved on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 415, 422, fn. 6 and *People v. Majors* (1998) 18 Cal.4th 385, 411; *People v. Patrick* (1981) 126 Cal.App.3d 952, 967 [same]; and *People v. McIntyre* (1981) 115 Cal.App.3d 899, 911 [same].

On the other hand, in *People v. Deletto* (1983) 147 Cal.App.3d 458 [Third Dist.], the court held that the federal constitutional *Chapman* standard applied. It explained that the failure to give a unanimity instruction has the effect of lowering the prosecution's

burden of proof, and an instruction that lowers the prosecution's burden of proof violates due process. (*Deletto*, at p. 472.) Other cases holding that the *Chapman* standard applies include *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [First Dist., Div. Three]; *People v. Thompson* (1995) 36 Cal.App.4th 843, 853 [Third Dist.]; *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [Fifth Dist.]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 615, fn. 13 [First Dist., Div. Two], disapproved on other grounds in *People v. Russo*, *supra*, 25 Cal.4th at p. 1136; *People v. Gordon* (1985) 165 Cal.App.3d 839, 855 [Third Dist.], disapproved on other grounds in *People v. Frazer* (1999) 21 Cal.4th 737, 765 and *People v. Lopez* (1998) 19 Cal.4th 282, 292; and *People v. Metheney* (1984) 154 Cal.App.3d 555, 563, fn. 5 [Fifth Dist.].

We find *Deletto*'s reasoning more persuasive. "The applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case . . . ." (*Patterson v. New York* (1977) 432 U.S. 197, 211, fn. 12 [97 S.Ct. 2319, 53 L.Ed.2d 281.) Like the requirement of jury unanimity, the definition of a crime is a matter of state law (subject to federal constitutional limits). (*Schad v. Arizona* (1991) 501 U.S. 624, 640 [111 S.Ct. 2491, 115 L.Ed.2d 555] [plur. opn.].) However, once state law has defined what constitutes a single instance of a crime -- the unit of prosecution -- the federal Constitution requires proof beyond a reasonable doubt that the defendant committed *that crime*.

For example, California defines both premeditated murder and felony murder as murder in the first degree. (Pen. Code, § 189.) As a result, "jurors need not unanimously

agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) "It is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, [the jury] need not decide unanimously by which theory he is guilty. [Citations.]" (*People v. Santamaria* (1994) 8 Cal.4th 903, 918 [perpetration versus aiding and abetting].) "Not only is there no unanimity requirement as to the theory of guilt, the individual jurors themselves need not choose among the theories, so long as each is convinced of guilt." (*Id*. at p. 919.)

We believe California could, if it chose, define premeditated murder and felony murder as distinct crimes. That is, a defendant who kills a single person *both* with premeditation and deliberation *and* in the commission of a specified felony would be guilty of two crimes (subject, of course, to the limitations on multiple punishment; see Pen. Code, § 654). Once California did so, however, the jury could not convict a defendant of premeditated murder unless premeditation was shown beyond a reasonable doubt; and the same jury could not convict the same defendant of felony murder unless the commission of the murder in the commission of a predicate felony was shown beyond a reasonable doubt. The federal Constitution's reasonable doubt requirement would attach separately to each separate crime

Moreover, once state law has conferred a right to jury unanimity, the federal Constitution demands that each juror be convinced of the defendant's guilt beyond a reasonable doubt. California could amend its Constitution to provide for 9-3 verdicts in

criminal cases; it would be no skin off the federal Constitution's nose. (*Johnson v. Louisiana* (1972) 406 U.S. 356, 359 [92 S.Ct. 1620, 32 L.Ed.2d 152].) Once California did so, however, the federal Constitution would require that at least 9 of the jurors voting to convict must be convinced of guilt beyond a reasonable doubt. (See *id*. at pp. 362-363.) As California has chosen, instead, to demand 12-0 verdicts in criminal cases, the federal Constitution concomitantly requires that all 12 jurors voting to convict must be convinced that the defendant is guilty of the charged crime beyond a reasonable doubt. Otherwise, the reasonable doubt requirement would become meaningless.

"Th[e] requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*People v. Russo*, *supra*, 25 Cal.4th at p. 1132, quoting *People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) When the trial court erroneously fails to give a unanimity instruction, it allows a conviction even if all 12 jurors (as required by state law) are not convinced that the defendant is guilty of any one criminal event (as defined by state law). This lowers the prosecution's burden of proof and therefore violates federal constitutional law. (*Francis v. Franklin* (1985) 471 U.S. 307, 326 [105 S.Ct. 1965, 85 L.Ed.2d 344]; *Sandstrom v. Montana* (1979) 442 U.S. 510, 521 [99 S.Ct. 2450, 61 L.Ed.2d 39].) We conclude that we must apply the *Chapman* standard. (See *Rose v. Clark* (1986) 478 U.S. 570, 579 [106 S.Ct. 3101, 92 L.Ed.2d 460] [*Chapman* applies to instruction that impermissibly shifts burden of proof].)

"[U]nder the mandate of *Chapman* . . . we must ultimately look to the *evidence* considered by defendant's jury under the instructions given in assessing the prejudicial impact or harmless nature of the error." (*People v. Harris* (1994) 9 Cal.4th 407, 428.) "[W]e must inquire whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on *evidence* establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction. [Citation.]" (*Id.* at p. 429.)

Defendant presented a unitary defense with respect to all of the firearms -- that they belonged to his mother, and he had no dominion or control over them. By contrast, the defendant in *Crawford* had different defenses with respect to the different firearms: He claimed he knew nothing about one of the firearms found in his bedroom; his girlfriend testified that she owned the second firearm; and the third and fourth firearms were found in an upstairs bedroom occupied by yet another person. Here, the jury obviously disbelieved defendant's mother's testimony.

As we have already noted, the jury reasonably could have distinguished between the guns seen on May 9 and the guns found on May 11. Moreover, some jurors could have had a reasonable doubt that defendant was in possession of the May 9 guns.

As to the May 11 guns, however, the jury had before it defendant's damning admission: "[M]y guns are in the light fixtures above the kitchen . . . ." Perhaps some jurors still harbored a reasonable doubt as to whether defendant was in possession of the May 11 guns *not* found in the light fixture (i.e., the guns in the bathroom, the study, and a kitchen cupboard). Once they determined to reject defendant's mother's testimony,

however, none of the jurors would have had a reasonable doubt that defendant was in possession of the guns in the light fixture.

We conclude, therefore, that the trial court erred by failing to give a unanimity instruction, but the error was harmless beyond a reasonable doubt.

VI

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.